No. 14885

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

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I.

Statement of Jurisdiction.

On November 16, 1949, Honorable William C. Mathes, Judge, United States District Court for the Southern District of California, sentenced appellant, on his plea of *nolo contendere* to three misdemeanor counts alleging violations of Section 633 of Title 50, Appendix, United States Code, to imprisonment for one year and to pay a fine of $10,000.00 on one count, suspended the imposition of sentence on the other two counts, and placed him on probation for five years after his release from custody, on condition that he pay a fine of $20,000.00 [Govt. Ex. 8, Judgment of Nov. 16, 1949]. By Judgment entered on August 26, 1955, the same Court revoked and terminated its prior probationary order, pursuant to Section 3653 of Title 18 of the United States Code, and sentenced

appellant to two years imprisonment and to pay a fine of $20,000.00 [Govt. Ex. 8, Judgment of Aug. 26, 1955].

On August 31, 1955, appellant filed his Notice of Appeal to this Court from the Judgment of August 26, 1955, pursuant to Section 1291 of Title 28 of the United States Code [R. p. 2].

II.

Concise Statement of the Appeal and Questions Presented.

The original Judgment of November 16, 1949, placed appellant on probation for five years on the condition, among others, that during the probationary period appellant should pay to the United States of America a fine of $20,000.00 *"such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct"* [Govt. Ex. 8, Judgment of Nov. 16, 1949].

On July 22, 1955, the Probation Officer filed a petition asking the United States District Court for the Southern District of California to issue a bench warrant for the return of appellant before the Court to show cause why the probationary order previously entered should not be vacated and sentence imposed [Govt. Ex. 8, Petition of Chief Probation Officer of July 22, 1955]. A hearing was held and evidence was presented on August 22, 1955 [Tr. Aug. 22, 1955].

By Judgment entered on August 26, 1955, the Court found that appellant had wilfully failed to make any payment since June 20, 1951, on the fine imposed as a condition of probation, that appellant at all times had the ability so to do, and that in July, 1955, appellant stated he had no intention to pay any part of the fine. The Court fur-

ther found that appellant had thus violated the conditions of probation and of the probation order of November 16, 1949, and thereupon revoked and terminated the probationary order and sentenced appellant to imprisonment for two years and a fine of $20,000.00 [Govt. Ex. 8, Judgment of Aug. 26, 1955].

Appellant raises on this appeal the following questions:

(1) Whether or not, as a matter of law, there has been a violation of the conditions of probation, in that at no time did the Probation Officer issue any directions to appellant either as to the times of payment of the fine imposed or the installments in which said fine should be paid, as required by the original Judgment of November 16, 1949; and

(2) Whether, even if valid directions for payment of the fine were given by the Probation Officer, there is substantial evidence to support the Court's findings in its Judgment of August 26, 1955; and

(3) Whether, in view of the evidence at the hearing on August 22, 1955, and the prior proceedings in this case, the Court acted in excess of its discretion in revoking and terminating appellant's probation; and

(4) Whether the Court below erred in admitting in evidence over appellant's objection six letters [Govt. Exs. 1-6] not from the Probation Officer, but from the United States Attorney's Office, directed to appellant and relating to payment of the fine.

III.

Specification of Errors.

Appellant asserts that the Court below committed the following errors:

> (1) The Court below erred in making the finding that: ". . . defendant has violated the conditions of probation and of the probation order of Nov. 16, 1949" [Govt. Ex. 8, Judgment of Aug. 26, 1955],

in that the condition allegedly violated was that appellant pay a fine of $20,000.00,

> "such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct" [Govt. Ex. 8, Judgment of Nov. 16, 1949],

and there is no substantial evidence that any directions as to times of payment or installments to be paid were ever given appellant. This specification is discussed below in Part VI-A of this brief.

> (2) The Court below erred in making the findings that: ". . . defendant has wilfully failed to make any payment since June 20, 1951, on the fine imposed as a condition of probation, and that the defendant has at all times had the ability so to do" [Govt. Ex. 8, Judgment of Aug. 26, 1955],

in that there is no substantial evidence that appellant had the ability at all times to make payments on the fine and in that, on the contrary, appellant, being unable to pay, could not wilfully fail to pay. This specification is discussed below in Part VI-B of this brief.

> (3) The Court below erred in making the finding that: ". . . in July of this year, the defendant stated he had no intention to pay any part of the fine" [Govt. Ex. 8, Judgment of Aug. 26, 1955],

in that there is no substantial evidence to sustain this finding. This specification is discussed below in Part VI-C of this brief.

(4) The Court below abused its discretion in revoking and terminating appellant's probation in that there was no substantial evidence of any violation of the conditions of probation. This specification is discussed below in Part VI-D of this brief.

(5) The Court below abused its discretion in revoking and terminating appellant's probation in that the Court revoked and terminated such probation on the basis of conjecture and surmise, unsupported by any evidence whatever. This specification is also discussed below in Part VI-D of this brief.

(6) The Court erred in admitting in evidence, over timely objection, six letters to appellant [Govt. Exs. 1-6] from the United States Attorney's Office—not from the Probation Office—relating to payment of the fine. This specification is discussed below in Part VI-E of this brief.

IV.

Statement of the Case.

On September 8, 1949, Judge William C. Mathes of the United States District Court for the Southern District of California accepted a plea of *nolo contendere* from appellant to three misdemeanor counts of a seventeen count indictment [Tr. Sept. 8, 1949, p. 9, lines 10-15]. The first of those three counts (Count 6) charged appellant with beginning construction on a house when such construction was not authorized under the appropriate priority orders. Each of the other two counts (Counts 7 and 8) charged appellant with selling to a person without a priority rating a prefabricated house into which were

incorporated priority materials [Govt. Ex. 8, Indictment filed April 27, 1949].

In the Pre-sentence Report of September 26, 1949, the Probation Officer stated:

> "This defendant does not impress the writer as being in need of probationary supervision, nor does it appear that institutional treatment would serve any useful purpose. It is therefore respectfully suggested that imposition of a fine might be an appropriate disposition." [Govt. Ex. 7, Pre-Sentence Report, Sept. 26, 1949, last paragraph.]

This same report disclosed that appellant had never been in any difficulty with the law before, and had never before even been arrested.

At the formal hearing on September 27, 1949, the Government recommended as sentence a fine of $2,000.00 on each count, or a total of $6,000.00 [Tr. Sept. 27, 1949,[1] p. 16, lines 19-20]. The Court continued the matter for the purpose of obtaining additional information as to the profits of appellant [Tr. Sept. 27, 1949, p. 26]. On November 16, 1949, the Government made a second recommendation of a sentence of a fine of $5,000.00 on each count, or a total of $15,000.00 [Tr. Nov. 16, 1949, p. 46, lines 9-10].

The formal Judgment of November 16, 1949, sentenced appellant to one year's imprisonment and a fine of $10,000.00 on Count 6, the maximum permitted by law, appellant to be imprisoned until the fine be paid or he be

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[1]The Transcript Volume whose cover bears only the date of "Thursday, September 8, 1949" contains also the transcripts of September 27, 1949, October 5 and 14, 1949, November 16 and 21, 1949, December 12, 1949, and January 12, 1950.

otherwise discharged, and further suspended imposition of sentence on Counts 7 and 8 and placed appellant on probation for five years commencing on his release from custody. One condition of probation was that during the probationary period the appellant should pay to the United States of America a fine of $20,000.00, *"such fine to be paid at such times and in such installments as the Probation Officer of this Court shall direct"* [Govt. Ex. 8, Judgment of Nov. 16, 1949]. There is no contention that any other condition of probation was violated.

On January 13, 1950, at a hearing on appellant's motion for reduction of this sentence before Judge Mathes, the Government stated [Tr. Jan. 13, 1950, p. 11, lines 6-10]:

> "Our recommendation the last time was a $15,000 fine, and that is our recommendation again. The Government would not object to a reduction in the jail sentence to three months or admission of the defendant to probation if the court feels that is a proper sentence."

The motion for reduction of sentence was nevertheless denied [Tr. Jan. 13, 1950, p. 34, lines 16-25].

Appellant thereupon served his jail sentence under Count 6, plus an additional thirty days for being unable to pay the fine imposed thereon [Tr. Aug. 22, 1955, p. 46, lines 21-25], and was released from prison on November 15, 1950 [Govt. Ex. 7, POG Report of Nov. 20, 1950]. During 1951, appellant made a payment of $1,500.00 which was applied on his fine of $20,000.00 [Tr. Aug. 22, 1955, p. 61, line 24, to p. 62, line 4; pp. 80-81].

On August 15, 1951, appellant filed a petition to terminate probation and to remit the fine [Govt. Ex. 8, Petition filed Aug. 15, 1951]. The minutes of the hearing

recite the statement of the Assistant United States Attorney that the "Gov't has no objection to terminating probation and reducing fine" [Govt. Ex. 8, Minutes of Court, Sept. 10, 1951]. The Court denied the petition "without prejudice" [Govt. Ex. 8, Order of Dec. 12, 1951, filed Dec. 13, 1951], the minutes reciting "May be renewed on changed conditions if counsel is so advised" [Govt. Ex. 8, Minutes of Court, Nov. 19, 1951].

The petition for the revocation and termination of appellant's probation was filed on July 22, 1955 [Govt. Ex. 7]. After hearing, the Court, through Judge Mathes, entered its Judgment on August 26, 1955, revoking and terminating the probationary order and sentencing appellant to one year and $10,000.00 on each of Counts 7 and 8, to run consecutively, or a total of two years and $20,000.00, appellant to stand committed until the fine be paid or he be otherwise discharged as provided by law [Govt. Ex. 8, Judgment of August 26, 1955]. With respect to each of these counts, as with Count 6 earlier, this is the maximum imprisonment and the maximum fine permitted by law.

The uncontradicted facts as to appellant's earnings are contained primarily in his own monthly reports to the probation office [Govt. Ex. 7, Monthly Reports of appellant, Dec. 4, 1950-July 4, 1955] which appellant faithfully and regularly prepared and filed. There is no suggestion that they are inaccurate in any particular.

During the time between his release from prison on November 15, 1950, and December 15, 1951, appellant was unable to obtain any sort of job. During this year appellant earned only $32.00 (commission for selling lumber) [Govt. Ex. 7, Monthly Report, April 4, 1951], and

received a $200.00 bonding company refund in connection with prior litigation [Govt. Ex. 7, Monthly Report, Nov. 5, 1951]. From December 15, 1951, until June 4, 1952, appellant worked for one, Oscar Rudnick, receiving $3,-750.00, his only earnings of any consequence during the whole period of his probation [Govt. Ex. 7, Monthly Reports, Jan. 4, 1952-July 2, 1952]. At that time—nor at any time until more than 3 years later—no complaint was made to the Court that appellant was not living up to his probation [Tr. Aug. 22, 1955, p. 20, lines 15-20]. Moreover, it is not contradicted that part of these earnings had to be used for a down payment on an automobile required by appellant in order to perform his job for his employer [Tr. Aug. 22, 1955, pp. 40-41].

Thereafter, appellant was unable to find any work for three and one-half more months [Govt. Ex. 7, Monthly Reports, July 2, 1952-Oct. 1, 1952]. From September 15, 1952, until his arrest in this matter, he worked as a furniture salesman, first at $200.00 per month and subsequently at $50.00 per week [Govt. Ex. 7, Monthly Reports, Oct. 1, 1952-July 4, 1955]. After August 1, 1953, this employment was at a primarily used furniture store run by appellant's wife [Govt. Ex. 7, Monthly Report, Sept. 2, 1953]. Thus appellant's earnings during the entire 4 years, 7½ months period of probation, based upon the uncontradicted evidence, were:

1950 (1½ months)	Nothing
1951	$1,232.00
1952	3,350.00
1953	2,400.00
1954	2,600.00
1955 (6 months)	1,300.00

This is an average of only $195.00 per month.

The used furniture store of appellant's wife was known as National Furniture Company and operated in 1954 at a net profit of $1,223.61, after paying appellant a total salary of $2,600.00 [Deft. Ex. B, Affidavit of Ralph O. Buntin]. Appellant's wife had opened this store in the middle of 1953, with loans totaling approximately $5,000.00 from her children [Deft. Ex. A, Affidavit of Lilian Brown Prusan of Aug. 15, 1955; Deft. Ex. C, Affidavit of Ruth Brown Miller of Aug. 15, 1955; and Deft. Ex. D, Letter of Stanley Brown of Aug. 5, 1955]. It was a family store in which both appellant and his wife worked long and hard [Tr. Aug. 22, 1955, p. 45, line 7, to p. 46, line 9] and from which they barely made their living. Its credit rating was bad [Deft. Ex. E].

At the time of sentence in November, 1949, appellant's property was not substantial, consisting of a house bought with his wife's money for $23,000.00—subsequently sold for $15,000.00 or $16,000.00 [Tr. Aug. 22, 1955, p. 59, lines 23-25]—(with a $7,600.00 encumbrance), a 1946 Oldsmobile, $240.00 in the bank, $500.00 in Government Bonds, $50.00 of stock, some furniture and personal belongings, and $15,000.00 face amount of life insurance on which he had borrowed to the limit [Govt. Ex. 8, Affidavit of Jack Brown, filed Dec. 6, 1949; Govt. Ex. 7, Pre-Sentence Report of Sept. 26, 1949]. The only substantial asset, appellant's wife's house, was sold in 1951, pursuant to an arrangement whereby the Government released its lien and appellant paid $1,500.00 on the fine [Govt. Ex. 7, Letter of Feb. 15, 1951, Brown to Tolin; Letter of March 28, 1951, Meador to Tolin; Tr. Aug. 22, 1955, p. 61, line 24, to p. 62, line 4]. *At the time of this $1,500.00 payment, appellant had none of the above assets left except the borrowed-on insurance policies* [Govt. Ex. 8, Affidavit of

Jack Brown filed Oct. 25, 1951]. The house, as stated, was sold and the proceeds remaining eventually wound up in an $11,500.00 home in Bakersfield encumbered by $9,500.00 of mortgages [Tr. Aug. 22, 1955, p. 58, lines 1-24].

In 1951, the Probation Office requested an FBI investigation of appellant's finances, stating [Govt. Ex. 7, Letter of June 8, 1951, Meador to Tolin]:

> "As the matter now stands, Brown informs me that he is unemployed, and is without funds, and is being supported by relatives. That he has no property except an equity in his home, against which your office has placed a lien. *I have not been able to make any collection program with this man* because of these allegations." (Emphasis supplied.)

This investigation of appellant lasted into 1952 [Govt. Ex. 7, Report of MAS, June 2, 1952]. No evidence contradicting the facts offered by appellant as to his financial condition during the probationary period was offered by the Government at the hearing for revocation of probation, nor does any appear anywhere in the record.

At the time of the original sentence, there was a dispute between the Government and appellant as to the profit appellant allegedly made in 1946 through the sale of material for houses [*Cf.*, Govt. Ex. 8, "MEMORANDUM REGARDING SENTENCE OF JACK BROWN: PROFITS—FEDERAL HOUSING ADMINISTRATION VIOLATION," filed Jan. 12, 1950]. Appellant contended any profits he might have made were wiped out by losses in 1946, 1947, and 1948, and the Government conceded [Tr. Jan. 13, 1950, p. 3, lines 9-12]:

> *"It may well be true that in the years 1946, '47 and '48, during the time when Brown and his asso-*

ciates were in business, looking at all of the transactions of all of the corporations, they came out with less than they started with." (Emphasis supplied.) [See, also Govt. Ex. 8, "MEMORANDUM RE SENTENCE OF JACK BROWN: PROFITS FROM FEDERAL HOUSING ADMINISTRATION VIOLATION," filed Oct. 12, 1949, p. 2, lines 1-5].

Appellant contended that after his enterprises were liquidated in 1948, he had no funds left [Govt. Ex. 8, Affidavit of Jack Brown, Oct. 23, 1951, filed Oct. 25, 1951]. *There is no evidence whatever in the record of any other assets or property owned or controlled by appellant* other than those discussed above.

V.

Summary of Argument.

A. The Probationary Order Delegated to the Probation Officer the Sole Authority to Direct Appellant as to the Times and Installments in Which the Fine Was to Be Paid. No Such Directions Were Given. Appellant Could Not Therefore Be Properly Held to Have Violated Such Non-existent Directions.

Appellant's 5 year probation was revoked just 4 months prior to its expiration for an alleged wilful failure to pay during the probationary period a $20,000.00 fine imposed as a condition of such probation. The Court's judgment stating the conditions of probation commanded that said fine be paid "at such times and in such installments as the Probation Officer of this Court shall direct."

No such directions were ever given appellant. The Chief Probation Officer conceded that no "definite" or "specific" instructions or directions were given. There were no written directions of any character from the Pro-

bation Officer. Dunning letters to appellant from the United States Attorney, admitted over objection, cannot supply this fatal deficiency, for under the Court's judgment the times and installments of payment were to be fixed only by the Probation Officer. No delegation of authority could be or was made. And even the letters from the United States Attorney did not purport to give any directions to appellant as to the times and installments of payment.

Thus, as a matter of law, there having been no compliance with the Court's judgment requiring the giving of definite directions to appellant as to the times and installments in which he was to make payment, appellant cannot be properly held to have violated such non-existent conditions.

B. Appellant Throughout the Probationary Period Struggled to Earn a Living and Was Unable to Make Payments on the Fine. His Failure to Make Payments Was Thus Not Willful.

Appellant made no payments upon the fine after a $1,500.00 payment on June 20, 1951, because, as the evidence makes abundantly clear, he was unable to do so. His earnings during his four and one-half years of probation averaged only $195.00 per month. He was nearly sixty and in poor health. He had periods of unemployment. During the last two years appellant and his wife worked long and hard in a small furniture store in Bakersfield struggling to earn and preserve a marginal existence. This store, dealing primarily in second-hand furniture, was begun with money borrowed from appellant's children.

Appellant reported his income regularly each month to the Probation Office for the more than four and one-

half years of his probation. There is no contention that they were other than accurate. He was visited or had personal interviews with various probation officers at least nineteen times. The Probation Office file discloses that at no time until the petition for revocation was filed was there any suggestion or intimation to appellant that he was violating any of the conditions of his probation. This fairly reflects the attitude and appraisal of the agency which knew appellant's economic situation best. No change of any kind in appellant's circumstances occurred at or prior to the revocation petition.

The Court below erred in finding that appellant had "wilfully" failed to make payments on the fine while "at all times" having the ability to do so. There is no substantial evidence to support this finding; all the substantial evidence is to the contrary.

C. Appellant Was Always Willing to Pay the Fine if He Could, and Never Expressed an Intention Not to Pay Any Part of the Fine.

The Court's finding that on July 14, 1955, appellant stated that he had no intention of paying the fine is based entirely upon the equivocal and confused testimony of Probation Officer Algots who was visiting appellant for the first time. This is denied by appellant. What he did say was that he was not paying the fine because he had no assets.

The alleged blunt refusal to pay is totally out of harmony with the history of appellant's long and cooperative relations with the Probation Office. He plainly lived up to every other condition of probation throughout the entire period. No other Probation Officer ever reported any such declaration by appellant before. And it would

appear to be contradicted by Algots' own letter-report that the interview was "friendly and forthright." Even in Algots' letter-report the alleged statement is coupled with appellant's statement that he had no assets.

D. The Court Abused Its Discretion in Revoking Appellant's Probation.

The power of a Court to revoke probation is not unlimited. It is a judicial power to be judicially exercised "in accordance with familiar principles governing the exercise of judicial discretion." *Burns v. United States,* 287 U. S. 216, 222-223 (1932).

The lack of substantial affirmative evidence to support the findings of the Court below upon which the revocation of appellant's probation is based establishes that the Court acted in excess of its jurisdiction. That the revocation of probation was based upon and motivated by conjecture and unfounded suspicion rather than factual evidence is shown by the record. Throughout, the Court below has held to and repeatedly announced the fixed belief—despite overwhelming evidence to the contrary—that appellant has, and has always had, substantial concealed assets "salted away."

Not only is this denied by appellant and refuted by every aspect of his life during the past five years, but neither the Government through the United States Attorney nor the Probation Office—with all the facts at their command—has contended that appellant has any hidden or concealed assets. Nor was it charged in the petition for revocation. Yet it emerges as the real ground of decision and thus constitutes an abuse of judicial discretion.

E. The Letters to Appellant From the United States Attorney Were Improperly Admitted. The Probationary Order Authorized Only the Probation Officer to Give Directions Respecting Payment of the Fine.

The admission into evidence over appellant's objection of six letters from the United States Attorney to appellant requesting arrangements be made to pay the fine was clearly erroneous.

Even if these letters constituted the "direction" as to the "times and installments" called for by the Court's original judgment in which the $20,000.00 fine was to be paid during the probationary period—which is apparently the basis on which they were admitted—the Court's judgment delegated the authority to fix these conditions only to the Probation Officer of the Court. Under the judgment there could be no valid delegation of this authority to the United States Attorney, nor was there any.

Moreover, the letters on their face are merely the dunning letters of a creditor to a debtor; they do not—and do not purport to—fix or direct terms and conditions of payment. Nor is it even clear that the references to the fine are to the $20,000.00 fine rather than the earlier $10,000.00 fine. The latter is more likely.

VI.
ARGUMENT.

A. The Probationary Order Delegated to the Probation Officer the Sole Authority to Direct Appellant as to the Times and Installments in Which the Fine Was to Be Paid. No Such Directions Were Given. Appellant Could Not Therefore Be Properly Held to Have Violated Such Non-existent Directions.

The original Judgment of November 16, 1949, required appellant to pay a fine of $20,000.00 as a condition of probation, "at such times and in such installments as the Probation Officer of this Court shall direct." Appellant contends that the evidence adduced at the hearing establishes that at no time did the Probation Officer issue any such directions. Hence, as a matter of law, there can not have been any violation of such directions.

In 1951, the Chief U. S. Probation Officer wrote to the then United States Attorney [Govt. Ex. 7, Letter of June 8, 1951, from Meador to Tolin]:

> "As the matter now stands, Brown informs me that he is unemployed, and is without funds, and is being supported by relatives. That he has no property except an equity in his home against which your office has placed a lien. *I have not been able to make any collection program with this man because of these allegations.*" (Emphasis supplied.)

Thus, according to the Chief U. S. Probation Officer himself, no directions regarding payment of the fine had been given appellant prior to June 8, 1951, and we must look for such directions, if any, after that date. Further, later in that year Appellant petitioned to have his probation terminated and, while the petition was denied, it was

denied "without prejudice" [Govt. Ex. 8, Order of Dec. 12, 1951, filed Dec. 13, 1951]. This is significant, for after a Court hearing at the end of 1951, there was not only no suggestion that Appellant was violating any of the conditions of his probation, but his right to such termination in the future was recognized. Certainly, had directions been given of which Appellant was then in violation this would have been made very clear by the Probation Office and the Government at that time. Yet the Government, in the face of the foregoing evidence, now relies strongly—if not entirely—to support its position that "directions" had been given, upon an alleged oral statement one of the probation officers reported he had made to Appellant back in 1950 that he make "regular monthly payments, even if the payments were small." [Govt. Ex. 7, POG Report of Nov. 20, 1950.]

The Government offered in evidence at the hearing the entire file of the Probation Office [Govt. Ex. 7]. In the whole file, the only material that might even be seriously urged to be a "direction" to pay is the report just referred to of a visit on *Nov. 20, 1950*—approximately 5 years before revocation of Appellant's probation—of a Probation Officer to Appellant [Govt. Ex. 7, POG Report of Nov. 20, 1950]. However, as pointed out, the Chief Probation Officer himself, *in 1951,* did not consider that any directions for payment had yet been given to Appellant [Govt. Ex. 7, Letter of June 8, 1951, Meador to Tolin].

In the period between appellant's first conversation with a probation officer in 1950 and the time of revocation of his probation, appellant had paid $1,500.00 on his fine [Tr. Aug. 22, 1955, p. 61, line 24, to p. 62, line 4]. No directions or suggestions from the Probation Office

as to times and amounts of payments to be made on the fine appear in either the Probation Office file [Govt. Ex. 7] or the official Court file [Govt. Ex. 8] after that payment. *In all the numerous reports of the numerous visits of the Probation Officers thereafter, contained in Government Exhibit 7, there is no report of even any suggestions, let alone directions, that appellant make any payments on the fine.*

The lack of such direction was not a mistake or error on the part of the Probation Officers. It fairly reflects the exercise of their "good judgment" and their appraisal of the situation. [Tr. Aug. 22, 1955, p. 21, lines 4-20]. They were intimately acquainted with appellant's poor financial situation and knew that appellant could not make payments. Any directions to pay, they fully realized, would thus be useless and unreasonable.

In their judgment, it is apparent, based upon their knowledge of appellant's circumstances, the giving of such directions would have been futile. Hence none were given. Appellant remained on probation reporting regularly and having repeated personal contact with the Probation Office for 4 years, 7½ months. If he had been in constant and continuous violation of his probation almost from the outset as is now asserted—and as the Court below found—it would certainly have been reported to the Court long before. No such report was made and no suggestion of violation appears anywhere in the thick and voluminous Probation Office file [Govt. Ex. 7]. This is powerfully persuasive evidence of the non-existence of any such violation.

In his testimony at the revocation hearing, the Chief U. S. Probation Officer admitted that no "definite amount" was ever set for appellant to pay and that no "definite"

or "specific instruction" was ever given appellant by the Probation Office [Tr. Aug. 22, 1955, pp. 9, 18]. Appellant himself testified that he was never given any directions as to specific payments to be made upon the fine [Tr. Aug. 22, 1955, pp. 47, 48].

Typical of the attitude of the Probation Office since 1951 is the report of AWB of March 24, 1955 [Govt. Ex. 7]:

> "Subject has never made any payments on his fine and it is doubtful that he ever will. There is little or nothing that anyone can do in this regard, as apparently he is without assets."

The fact that appellant has received a sentence of imprisonment twice as heavy on the revocation of probation as the original sentence imposed emphasizes how vitally important it is that there be no question that appellant wilfully ignored Probation Office *directions* as to *times* and *amounts* of payments, as the original judgment required, not merely hints or suggestions. On this record, however viewed, it must be concluded that such directions were never given and were totally absent.

In an attempt to muster some evidence that would be considered substantial of directions to appellant, the Government relies upon six letters—admitted over objection of appellant—written, not by the Probation Officer but by the United States Attorney, to appellant between September 14, 1951, and March 25, 1954, concerning payments on his fine[2] [Govt. Exs. 1-6]. While there was

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[2]While the letters are not clear, it is probable that the United States Attorney was trying to effect collection of the original committed fine on Count 6 rather than the $20,000.00 to be paid as a condition of probation. See, *e.g.,* Letter of March 25, 1954 [Govt. Ex. 6.]

testimony that the Probation Office and the United States Attorney "cooperated" in some undefined way in the collection of fines [Tr. Aug. 22, 1955, p. 8, line 19, to p. 9, line 3], the Probation Office is an arm of the Court, while the United States Attorney is a branch of the executive department. The Court in its judgment gave the *Probation Office* the power to direct payment of the fine on terms and conditions that seemed best to it. This duty obviously cannot be delegated Nor was there any such delegation. In fact, the Chief United States Probation Officer testified [Tr. Aug. 22, 1955, p. 7, lines 15-18]:

> "Q. Mr. Meador, is the U. S. Attorney authorized on your behalf to fix the terms and conditions of probation in so far as they relate to the payment of fines? A. No."

In addition, appellant was never informed that these letters from the United States Attorney were being sent for or on behalf of the Probation Office [Tr. Aug. 22, 1955, p. 50, lines 18-24]. They do not even purport to be from, or to be conveying a message for, the Probation Officer.

Even if they were to be regarded as from the Probation Office, these letters from the United States Attorney on their face are not the *directions* of an arm of the Court, but dunning letters of a creditor to a debtor. Thus, the letter of June 25, 1952, begins [Govt. Ex. 2]:

> "This is to let you know that you have not made arrangements to pay the fine. Inasmuch as the Department has requested that you make immediate steps to liquidate this account, we shall expect to hear from you at once in regard to the above matter."

The letter goes on to request appellant to make arrangements to pay in monthly installments "in large amounts."

The next letter, dated February 25, 1953, states [Govt. Ex. 3]:

> "For a considerable period of time the Government has endeavored to show you every consideration on your fine.
>
> "Up to this time, however, you have made no effort to take care of your account. It is our hope that you will be inclined to adjust this account as soon as possible. It is difficult to believe that you will do otherwise."

The final letter, dated March 25, 1954, recites [Govt. Ex. 6]:

> "We have repeatedly called your attention to the fact that you have not made a payment on the fine since June 20, 1951. We again urge you to make regular monthly payments on this debt to the Government until the entire amount is liquidated."

Note that in none of these letters is their any suggestion that appellant was in any way in violation of his probation.

The uncontradicted testimony of appellant was that, on each instance that he received a letter from the United States Attorney concerning his fine, he visited the United States Attorney and discussed with him his inability to pay the fine [Tr. Aug. 22, 1955, p. 47, lines 1-24]. The fact that appellant went on each occasion to the United States Attorney's Office, and the United States Attorney, not the Probation Office, talked to him, demonstrates again how baseless is the Government's claim that these letters from the United States Attorney constitute directions from the Probation Office.

Hence, there is no substantial evidence of any directions to appellant to make payments on his fine. The condition of probation was that he make payments thereon

"at such times and in such installments as the Probation Officer" should direct. No such directions were given The Probation Officer knew that appellant could not make payments. In the absence of such directions—required by the Court's judgment laying down the conditions of probation—appellant cannot be said to have violated his probation by failing to abide by such non-existent directions.

B. Appellant Throughout the Probationary Period Struggled to Earn a Living and Was Unable to Make Payments on the Fine. His Failure to Make Payments Was Thus Not Wilful.

In its Judgment of August 26, 1955, the Court specifically found:

> ". . . that defendant has willfully failed to make any payment since June 20, 1951, on the fine imposed as a condition of probation, and that the defendant has at all times had the ability so to do." [Govt. Ex. 8, Judgment of Aug. 26, 1955.]

Appellant contends that there is no substantial evidence to support these findings of the Court and that the evidence, on the contrary, establishes beyond any reasonable question that appellant was never in a position after June 20, 1951, to make payments on the fine and, hence, could not be charged with wilfully failing to do what he could not do.

During the four and one-half years of probation, appellant earned an average of $195.00 per month [Govt. Ex. 7, Monthly Reports, Dec. 4, 1950-July 4, 1955]. At the end of that period appellant was sixty years of age [born Nov. 25, 1894, Govt. Ex. 7, Pre-sentence Report of Sept. 26, 1949]. His health was poor at the time of

sentence [Govt. Ex. 8, Affidavit of Philip Yorshis, M. D., filed Dec. 6, 1949] and during probation [Govt. Ex. 7, Monthly Report of Oct. 4, 1954; Tr. Aug. 22, 1955, p. 43, line 17, to p. 44, line 6]. During the last two years of his probation, appellant and his wife had struggled along with a primarily used furniture store in Bakersfield, begun with loans from his children [Deft. Exs. A, C, and D, Affidavits and letter of Lilian Brown Prusan, Ruth Brown Miller, and Stanley Brown, respectively].

Appellant testified concerning this business [Tr. Aug. 22, 1955, p. 45, line 7, to p. 46, line 9]:

> "Q. When you started the furniture business, when you started, what kind of items did you put into the furniture store, what kind of inventory did you put in there? A. Well, we put in, as I said before, unpainted furniture, some finished furniture, and then I kept acquiring used furniture as time went on. I put an ad in the paper 'Used furniture wanted,' or I would take furniture in trade against some of the items we have in the place.
>
> Q. Did you put some of your own furniture and your children's furniture in there to sell? A. Yes, we did. At one time we had a 3-bedroom home when one of the daughters stayed with us but since then we have a 2-bedroom little house and we took about half of the furniture out of the house that we don't need and we have been selling that in the store. And my oldest daughter had a lot of surplus furniture in the garage and in her house and we got a truck and got it and we sold it in the store.
>
> Q. Both you and Mrs. Brown are in the store all day? A. From 8:00 until 6:00, Monday nights till 9:00. Every single day. We haven't missed a day even though we couldn't get up in the morning.

Q. Does that include Saturdays, too, are you open? A. Yes, sir.

Q. Where have you been having your meals there in Bakersfield during that period of time? A. Well, it might be at home, but during the day we have a stove in back of the store and Mrs. Brown fixes up a little lunch."

He further testified [Tr. p. 44, lines 7-22]:

"Q. With respect to the furniture shop that is up there in Bakersfield, do you have any salesmen in the shop apart from yourself and Mrs. Brown? A. No, sir. No salesmen whatsoever. Mrs. Brown and I do the buying, the selling, and the trading.

Q. What about advertising? Do you do any advertising up there? A. No, we can't compete with the big stores that advertise on television, radio. We just run little ads in the classified section of the paper. That's all.

Q. Do you have a delivery truck? A. No, we have the only furniture store that delivers with a little trailer hooked onto a car which we just traded for a 1952 Ford. The other was smashed up. We have a 19-year old boy that does the delivery for us. That's the only help that we have in the place."

This business eked out a net profit in 1954 of $1,223.61, after appellant's salary of $2,600.00 [Deft. Ex. B, Affidavit of Ralph O. Buntin].

Appellant, according to the uncontradicted testimony, had no assets during the period of probation, other than the insurance policies on which he had previously borrowed the full amount permissible, and the possible small equity in his encumbered house. Appellant always so stated during the entire period of probation [Govt. Ex. 8, Affidavit

of Jack Brown dated Oct. 23, 1951, filed Oct. 25, 1951; Govt. Ex. 7, Affidavit of Esther Brown, dated Oct. 22, 1951, filed Oct. 25, 1951; Tr. Aug. 22, 1955, p. 40, lines 3-5]. The Probation Officer said so [Govt. Ex. 7, AWB Report of March 24, 1955]. The FBI undoubtedly so concluded, for they investigated appellant's financial status [Govt. Ex. 7, MAS Report of June 2, 1952] and no Government action of any kind followed. *There is no evidence that says otherwise.*

In the course of the original sentencing, appellant, his wife, and his companies submitted their income tax returns to the scrutiny of the Court below [Govt. Ex. 8, Affidavits of Jack Brown filed Dec. 6, 1949, with attached returns; Supplemental Affidavits filed Dec. 9, 1949 and Dec. 16, 1949, with attached return]. No proceedings whatever have been started in the ensuing six years over these returns by the Federal authorities, and they remain unchallenged as true and accurate. Before appellant was released from prison on his sentence which he served on Count 6 he took the pauper's oath required by Section 3569 of Title 18 of the United States Code [Tr. Aug. 22, 1955, p. 46, lines 21-25] and no proceedings have ever been brought to attack that oath. Despite all these facts to the contrary, the Court below has always been and is now convinced that appellant somewhere, somehow, has substantial hidden assets. However, the Court below has in effect conceded that there is no *evidence* of any such concealed assets [Tr. Sept. 12, 1955, p. 19, lines 1-3]:

> "The Court: He is acting out a perfect act, just like anyone who has cash salted away. *And if the Government doesn't find it* he will get away with it, too." (Emphasis supplied.)

The Court below apparently not only believes appellant has assets concealed, but that these assets are very substantial [Tr. Sept. 12, 1955, p. 22, lines 14-23]:

> "The Court: Mr. Klinger, I am thoroughly convinced that Mr. Brown can pay this fine in full and have plenty left any time he wants to do it. . . . *But it is my belief, and it is my finding that he is financially able to pay it at any time out of the resources under his control.*" (Emphasis supplied.)

At the time the Court made this statement there was $18,500.00 due on the fine imposed as a condition of probation, and an additional $10,000.00 on the committed fine, or a total of $28,500.00. Thus, the Court was of the belief that appellant had hidden assets in excess of $28,500.00—assets which scrutiny and examination by every federal agency having jurisdiction have not disclosed, the existence of which appellant denies, and which every fact in the record below contradicts.

There is no contention in the record that appellant was not diligent in attempting to get work or that appellant failed to take any jobs offered him. On the contrary, as shown above, all the evidence clearly demonstrates that appellant constantly sought work, and worked steadily whenever jobs were available to him.

Contrast this with the behaviour of a deliberately contumacious person. Appellant could have pleaded his age and health, refused to work, and lived on the charity—or legal duty—of his children to support him. Instead, appellant has tried to be a useful citizen and, with the help of his wife to earn his own living. Had he given up completely, his probation would now be over. For fighting and struggling to earn a marginal existence, he is now

serving two more years in jail and is facing another $20,000.00 fine.

As an indication of appellant's cooperation, the uncontradicted testimony is that, on each instance that he received a letter from the United States Attorney concerning his fine, he visited the United States Attorney and discussed with him his inability to pay the fine [Tr. Aug. 22, 1955, p. 47, lines 1-24]. The United States Attorney at any time can enforce the fine by execution against a defendant's property in like manner as judgments in civil cases (18 U. S. Code 3565) and the taking of a pauper's oath does not discharge the obligation to pay the fine. *Smith v. United States,* 143 F. 2d 228, 230 (C. A. 9, 1944) cert. den. 323 U. S. 729. Yet the United States Attorney has never proceeded to enforce collection of the $10,000.00 fine—obviously because property upon which to levy was non-existent.

Appellant always attempted in good faith to obey all the conditions of his probation [Tr. Aug. 22, 1955, p. 48, line 22, to p. 49, line 3]. He paid $1,500.00 on the fine. He could pay no more. Not only were no directions given appellant by the Probation Office as to the times and installments of payment as required by the Court's judgment, but, as indicated above, and as the record demonstrates, he was in no position to pay, even if he had been directed. This was the attitude of the Probation Office and this was the fact. Hence, it cannot be properly said that he *wilfully* failed to pay.

Rather, it seems on all the evidence that appellant is being given an additional heavy sentence—double the original sentence—simply because he, as a matter of fact, did not pay his fine, without any real consideration of his intentions, willingness, or ability. It is well settled that a

court cannot impose an additional punishment merely for failure to pay a fine. *Chapman v. United States,* 10 F. 2d 124, 125 (C. A. 5, 1925, cert. den. 271 U. S. 667; *Vogel v. Wong,* 178 F. 2d 327, 329 (C. A. 6, 1949). In the *Chapman* case the Court imposed a fine and a sentence of imprisonment, but in default of payment of the fine, a heavier imprisonment. It was held that this was beyond the power of any court. On all the evidence, it is submitted that this is precisely the practical effect of what the Court below has sought to do in the present case.

C. Appellant Was Always Willing to Pay the Fine if He Could, and Never Expressed an Intention Not to Pay Any Part of the Fine.

Appellant contends that the Court also erred in making the finding:

> "The Court further finds that in July of this year, the defendant stated that he had no intention to pay any part of the fine." [Govt. Ex. 8, Judgment of Aug. 26, 1955.]

Appellant asserts that there is no substantial evidence to sustain this finding.

Appellant testified that he always tried to live up to the conditions of his probation [Tr. Aug. 22, 1955, p. 48, line 22, to p. 49, line 3]. There is no contention that he ever violated any of the conditions of his probation, except the one regarding the fine.

Appellant's general attitude toward the fine is illustrated by his uncontradicted testimony as to the letters he received from the United States Attorney [Tr. Aug. 22, 1955, p. 47, lines 7-24]:

> "A. Every time I received one of those letters I made it my business to go up and see the writer

and tell him my true status, what position I was in.

Q. Now, you did see the writer? A. Every time, every time, I never missed one.

Q. All right. And did you— A. Excepting one, I came all the way from Bakersfield and the writer wasn't in, so I spoke to someone in the office and I explained to him what it was and he said, well, it is their duty to try and collect, and if I don't have it I just don't have it, that's all.

Q. In each instance where you discussed it with the assistant that had the matter, what was the response of that assistant when you explained your financial situation? A. Well, they just said they have their duty to perform to try and collect some money on it if there is any money available, but if I don't have it I just don't have it, that's all."

The Probation Officers visited appellant as "regularly as possible" during the four and one-half years of appellant's probation, there being nineteen personal contacts [Tr. Aug. 22, 1955, p. 22, line 19, to p. 23, line 10]. *Despite this, there is nothing in the entire Probation Office file* [Govt. Ex. 7] *or the Court file* [Govt. Ex. 8] *containing any statement that appellant was not living up to his conditions of probation, prior to July 14, 1955.*

The Government has sought to use a report of Stanley J. Algots, the Fresno Probation Officer, and Algots' confused and equivocal testimony at the hearing, as a basis for the finding set forth above. This report and testimony related to an interview Algots had with appellant on July 14, 1955, the first time that Algots had ever met appellant [Tr. Aug. 22, 1955, p. 24, lines 15-21; p. 28,

lines 18-23]. In his report, Algots stated [Govt. Ex. 7, Letter of July 22, 1955, Algots to Meador]:

> "On July 14, 1955, the writer contacted Jack Brown at his wife's furniture store, 800 Baker Street, Bakersfield, California where he states he is employed at $50.00 per week. *The conversation was very friendly and forthright.* He related a woeful story about his conviction and why he should never have been prosecuted.
>
> "When questioned regarding his failure to make payments on the fine, subject stated that he had no intention of paying the fine and that it would be impossible for the Government to collect anything when he has no real assets.
>
> "It is suggested that you review this case with Mr. Arthur Brink, United States Probation Officer, the previous supervising officer." (Emphasis supplied.)

Algots' testimony concerning this interview and appellant's statements appear at pages 24-32 of the Transcript of August 22, 1955. He testified that he did not remember appellant's exact words [See, Tr. Aug. 22, 1955, p. 27, lines 1-7; p. 29, lines 2-6]. Algots finally stated that his best recollection was, not that appellant said he did not "intend" to pay the fine as Algots had said in his written report, but that appellant said he was not going to pay the fine [Tr. Aug. 22, 1955, p. 32, lines 3-13]. Algots testified that appellant followed this with the explanation that he had no assets with which to pay it [Tr. Aug. 22, 1955, p. 27, lines 15-20; p. 30, lines 14-20]. Appellant himself testified that he had never stated that he did not "intend" to pay the fine, but that he was not in a position to pay it because he had no money [Tr. Aug. 22, 1955, p. 38, line 20, to p. 39, line 8].

Algots agreed that appellant had said he was not able to pay the fine [Tr. Aug. 22, 1955, p. 30, lines 14-20].

Hence, the testimony is uncontradicted that appellant said at the interview that he had no assets with which to pay the fine. As previously pointed out, the evidence is also uncontradicted that appellant actually had no assets. The whole question then is whether or not a man who is unable to pay and says that he is not going to pay means that he is not going to pay because he is unable to pay or because he is unwilling to pay, even if he could. This esoteric point is made even more so by the fact that the Probation Officer himself is not clear as to exactly what words were used—and finally decided "intend" was not used—so that any conclusions he drew represent solely his feelings as to the attitude of a probationer he has never seen before. Further, they represent a feeling not expressed anywhere else in the files of the Probation Office or the Court at any time prior thereto by either the United States Attorney or any of the probation officers that had dealt with appellant during the preceding four and one-half years.

Moreover, appellant's testimony that he told Algots he was not paying the fine because he was unable to do so is far more consistent with the "friendly and forthright" nature of his interview with Algots than any blunt or belligerent declaration by appellant that he did not intend to pay the fine regardless of his ability to do so as the Court's finding implies.

The uncertain recollection of a probation officer, seeing appellant for the first time, in the face of four and one-half years of probation without complaint and without any hint or suggestion of violation, and appellant's uncontradicted lack of assets, is far short of the substantial

evidence needed to sustain a finding that appellant stated that he had no intention of paying any part of the fine, irrespective of his ability to pay. Certainly it is a wholly insufficient basis upon which to predicate the revocation of appellant's probation.

D. The Court Abused Its Discretion in Revoking Appellant's Probation.

Appellant contends that the termination of appellant's probation on the basis of findings unsupported by any substantial evidence was an abuse of the Court's discretion, and further, that the entire course of the proceedings and the statements made therein demonstrate that such termination was made on the basis of conjecture and suspicion.

While the Court is given the power to revoke probation by Section 3653 of Title 18, United States Code, it is well settled that this is a matter in which the Court must exercise its discretion fairly. In *Burns v. United States,* 287 U. S. 216, 222-223 (1932), Chief Justice Hughes said:

> "The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. *The Styria,* 186 U. S. 1, 9. It takes account of the law and the particular circumstances of the case and 'is directed by the reason and conscience of the judge to a just result.' *Langnes v. Green,* 282 U. S. 531, 541. While probation is a matter

of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

Mr. Justice Cardozo has also spoken on the subject of revocation of probation. In *Escoe v. Zerbst,* 295 U. S. 490, 493-4 (1935), in finding an attempted revocation of probation invalid, he said:

> "Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict or formal sense. *Burns v. United States, supra,* at pp. 222, 223. It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. *Burns v. United States, supra.* That much is necessary, or so the Congress must have thought, to protect the individual against malice or oppression. Almost equally it is necessary, if we read aright the thought of Congress, for the good of the probation system with all its hopes of social betterment."

And Mr. Justice Cardozo went on to say (295 U. S. 490, 494):

> "Judgment ceases to be judicial if there is condemnation in advance of trial."

Retribution is not the dominant objective of criminal law nor is vengeance the motivation for public prosecution.

Williams v. New York, 337 U. S. 241, 248 (1948); *Morissette v. United States,* 342 U. S. 246, 251 (1952).

This Circuit has also stated that probation may not be revoked except for cause. (*Kirk v. United States,* 185 F. 2d 185, 187 (C. A. 9, 1950).)

Just what the "discretion" of the Court means has been concisely set forth in *Langnes v. Green,* 282 U. S. 531, 541 (1931):

> "The term 'discretion' denotes the absence of a hard and fast rule. *The Styria v. Morgan,* 186 U. S. 1, 9. When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

In *Hollandsworth v. United States,* 34 F. 2d 423, 428 (C. A. 4, 1929), the Court said:

> ". . . In view of these several provisions of the act, it seems to be clear that, if the probationer complies with the condition of his probation, he is entitled to remain on probation, subject to the supervision of the court and its officers, until the maximum period of sentence expires, and is then entitled to a final discharge. The power of the court to revoke a probation and sentence the probationer may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him. It is not conceivable that Congress intended to confer upon the court the power to call back the defendant at any time within five years after conviction and imprison him, no matter how blameless his conduct may have been during the interim, or how strictly he may have observed the terms of his probation . . ."

See, also, *United States v. Koppelman,* 61 Fed. Supp. 1007, 1009 (M. D. Pa., 1945), where the Court said that in a probation revocation hearing doubts engendered by either the proof or the absence of it must be resolved in favor of the defendant.

Applying these principles, Courts of Appeals have had occasion to reverse revocations of probations entered by various lower courts. Thus, in *United States v. Van Riper,* 99 F. 2d 816 (C. A. 2, 1938), after a complete review of the evidence, the Court held that extensive and complicated counseling and advising of aliens as to obtaining citizenship did not justify a lower court revocation of probation imposed on immigration and naturalization charges. The Court pointed out that the conclusions on which the court acts must be based upon "relevant proven facts," and that the decision must not rest upon "whim or caprice or suspicion of misconduct not proven" (99 F. 2d 819).

The most recent case, and one analogous to the instant case, is *Hamilton v. United States,* 219 F. 2d 364, 366-367 (C. A. 10, 1955). Hamilton and one, Day, were placed on probation for income tax violations. While on probation, Hamilton owned and ran a drug store of his own in one town, and had a 51% interest in another drug store in a different town, managed entirely by Day. The Day-managed store was charged with selling drugs without prescriptions, and both Day and the store pleaded guilty. Because of this, Hamilton's probation in the income tax proceedings was revoked, on the sole grounds that he had a 51% interest in the offending store. The evidence was that Hamilton had no part in the management of the offending store, that he spent all his time in

a different city running his own store, and that he had relied on the monthly reports of an auditor as to the operations of the offending store. On the basis of this record, the Court of Appeals vacated the order revoking probation, and vacated and set aside the sentence imposed, stating that the trial court had exercised considerable feeling in the matter, and concluding that the revocation "cannot be considered by this court in any other light than as arbitrary and an abuse of judicial discretion." (219 F. 2d 367.)

Appellant contends that the lack of substantial evidence to support any of the findings of the Court below clearly shows that the Court acted in excess of its discretion in revoking appellant's probation. As Chief Justice Hughes stated (287 U. S. 216, 223):

> "While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice."

This language is particularly significant here when it is recalled that we have here the situation of a man who has struggled to earn a living and who had no intimation he was not living up to the terms of his probation until his probation was substantially over. In reviewing the entire proceedings, it is apparent that the termination and revocation of his probation and the two maximum sentences appellant has received, were motivated, in major part, by the feeling of the Court below that it would be simply impossible—"it defies my belief" [Tr. Sept. 12, 1955, p. 19, lines 4, 14-15]—for a person who was violating priority regulations in 1946 and doing the volume of business that appellant was doing, not to have made and retained a very substantial profit. *The Court below has throughout expressed its fixed belief, despite the total*

absence of any evidence whatever, that appellant always had and still has a substantial amount of property "salted away" [Tr. Sept. 12, 1955, p. 20, line 3].

There has never been any evidence offered at any time that appellant had or now has any concealed assets or any property "salted away." Nor has the Government ever stated or argued in Court that such is the case.

At the hearing on revocation of probation, the Court below still retained the notion of concealed assets by appellant, although no evidence or argument was offered thereon, stating [Tr. Aug. 22, 1955, p. 89, lines 3-14]:

> "The Court: As I said here before, it defies reason that men operate illegally on a cash basis, being able to charge as you could in those days, virtually anything you wanted to—
>
> The Defendant: Your Honor, please—
>
> The Court: —and not have anything come out of it to you.
>
> The Defendant: If your Honor please, may I say something?
>
> The Court: I have expressed that before.
>
> The Defendant: Yes.
>
> The Court: —and you know what my views are on it."

During the argument on the revocation of probation—not in the argument on the sentence to be imposed—the Court below again showed its belief which it apparently held since the original proceeding in 1949 by discussing and reading at length from a memorandum filed by the Government in 1950 concerning appellant's alleged profits during 1946 [Tr. Aug. 22, 1955, p. 62, lines 21-24; p. 63, line 25 to p. 65, line 13].

At the hearing on the motion for bail pending appeal on September 12, 1955, the Court again reiterated its belief that appellant had "salted away" property and that appellant, in the Court's opinion, was in a position not only to make payments on the fine, but to pay the fine in its entirety. The Transcript reads [Tr. Sept. 12, 1955, p. 18, lines 5-20]:

> "Mr. Klinger: There was never any program set up in this particular case for the payment of the fine.
>
> The Court: How do you set up a program for a man who takes in $2,000,000 in the last two quarters of the year in which he did business, cash under the table, in black market operations, and tells you he doesn't have anything. How are you going to set up a program for him?
>
> Now, obviously, the probation officer didn't believe him. I don't believe him, either. Now, if you can get the Court of Appeals to overrule that, reverse that decision, why, that is one thing. But I believe that Jack Brown has salted away—in the language of the street—that money, and he is doing everything he can, waiting until the time passes so that the five years is up; and if the probation officer neglected the matter another six months before coming in on the matter and reporting it to the court, he might have gotten away with it."

The Court further said [Tr. Sept. 12, 1955, p. 19, lines 1-16]:

> "The Court: He is acting out a perfect act, just like anyone who has cash salted away. And if the Government doesn't find it he will get away with it, too. It defies my belief—and you may be able to get judges to say I am clearly erroneous—but it defies my belief that a man will do $2,000,000 worth of

illegal business, not lawful business but illegal business during a time when you couldn't even keep—if you had a stick of lumber there were dozens of people ready to buy it, and apparently plenty of them willing to pay any price you asked for, and he does $2,000,000 worth of business—cash, not credit—in six months' time; and how much he did the preceding six months I don't know, but something comparable to it, a million dollars a quarter in cash, and he didn't come out with any of it. It just defies my belief of a man who knowingly is doing an unlawful business—and whatever you may say of defendant Brown, he wasn't stupid—"

As previously pointed out, the Court's statement here inferentially concedes that there is no *evidence* of any concealed assets.

The Court also said [Tr. Sept. 12, 1955, p. 20, lines 2-6]:

"The Court: $2,000,000 cash business is not a bubble, Mr. Klinger. It might be salted away somewhere—in the language of the street—in the earth or some well, waiting for the propitious time to dig it up; or it may be distributed among members of the family in some convenient way."

The Court concluded [Tr. Sept. 12, 1955, p. 22, lines 14-23]:

"The Court: Mr. Klinger, I am thoroughly convinced that Mr. Brown can pay this fine in full and have plenty left any time he wants to do it. Of course, I don't have to make that finding in order to revoke his probation. If I find he can pay anything on it, in good faith and should have done it, and was notified to and requested to do it and didn't do it, that is all that is necessary. But it is my belief, and it is my finding that he is financially able to pay it at any time out of the resources under his control."

How divorced the Court's impressions are from the evidence is indicated by the attitude throughout of the United States Attorney, who was, of course, familiar with all the facts. The United States Attorney *never* at any time in the case recommended imprisonment. Even after the Court had sentenced appellant originally to one year's imprisonment, the United States Attorney stated that the Government "would not object to a reduction in the jail sentence to three months or admission of the defendant to probation if the Court feels that is a proper sentence" [Tr. Jan. 13, 1950, p. 11, lines 6-10]. The highest fine ever recommended by the Government was one-half that imposed by the Court [Tr. Nov. 16, 1949, p. 46, lines 9-10]. After appellant had been on probation for a year and a half, the Government stated that it "has no objection to terminating probation and reducing fine" [Govt. Ex. 8, Minutes of Court, Sept. 10, 1951]. The Government's attitude is probably due to its apparent belief that appellant did not end up with a profit as the result of his overall operations, the Government having conceded [Tr. Jan. 13, 1950, p. 3, lines 9-12]:

> *"It may well be true that in the years 1946, '47 and '48, during the time when Brown and his associates were in business, looking at all of the transactions of all of the corporations, they came out with less than they started with."* (Emphasis supplied.)

From this it appears that the United States Attorney, the Probation Office, the evidence, and the appellant, all agree in pointing to the fact that appellant has no assets hidden away. The Court below alone apparently believes otherwise and has acted accordingly. This belief—unsupported—held by Court from the outset, is, we submit, the real basis of the revocation of appellant's probation. This

certainly is "an abuse of judicial discretion" as the Court stated it in reversing the revocation of probation in *Hamilton v. United States,* 219 F. 2d 364, 367, and not one based upon "relevant proven facts."

E. The Letters to Appellant From the United States Attorney Were Improperly Admitted for the Probationary Order Authorized Only the Probation Officer to Give Directions Respecting Payment of the Fine.

Appellant further contends that the admission by the Court of the letters of the United States Attorney to appellant [Govt. Exs. 1-6] was improper. Appellant made seasonable objection at the time the letters were offered [Tr. Aug. 22, 1955, p. 3, line 16, to p. 4, line 7; p. 7, lines 7-8; p. 10, lines 6-10].

The issue before the Court to which these letters were addressed was whether directions had been issued to appellant by the Probation Office which he had failed to heed. The letters in question on their face were from the United States Attorney, and not from the Probation Office. While there was testimony that the Probation Office and the United States Attorney "cooperated" in the collection of fines [Tr. Aug. 22, 1955, p. 8, line 24, to p. 9, line 8], the Chief Probation Officer testified that the United States attorney is not authorized on behalf of the Probation Office to fix the terms and conditions of probation insofar as they relate to the payment of fines [Tr. Aug. 22, 1955, p. 7, lines 15-18]. This is obviously so, for probation is supervised by the United States Probation Office as an arm of the Court, whereas the United States Attorney is an arm of the executive.

Further, the uncontradicted evidence is that appellant was never informed or told that the letters he received from the United States Attorney allegedly represented communications for or on behalf of the Probation Officer [Tr. Aug. 22, 1955, p. 50, lines 18-24]. It matters not that the Probation Officer may have talked to the United States Attorney before some of the letters were sent [Tr. Aug. 22, 1955, p. 7, line 19 to p. 8, line 9]. Neither the United States Attorney, the Probation Officer, nor the letters themselves, stated or even implied they were from the Probation Officer. A defendant cannot be found guilty, as here, pursuant to an alleged delegation of authority kept secret from him.

It thus is clear that the Court erred in admitting these letters over objection of appellant.

Conclusion.

Appellant was charged in the last four months of this five year probationary period with violation of a condition of probation that he pay a fine "at such times and in such installments as the Probation Officer . . . shall direct." No such directions were given. There is no evidence of any suggestion by anyone before then to him or to the Court that appellant was violating any condition of his probation. There was no change whatever in appellant's circumstances or conduct in these last four months. Only the confused testimony of a single probation officer out of all those who dealt with appellant during more than four and one-half years is relied upon to show appellant's alleged attitude in a hypothetical situation—whether appellant would pay if he should by chance have money, which he did not have.

Appellant, as a result of the two sentences, is condemned to three years imprisonment and fines totaling $30,000.00. This, despite the indications of the United States Attorney at various times in the proceedings that to him no imprisonment was necessary and that a fine one-half the amount imposed would be enough. This maximum imprisonment and fine appear from the evidence to have been imposed solely because the Court below, contrary to the evidence and the representations of counsel for both the Government and the appellant, believes that appellant has large amounts of concealed assets.

Because appellant was unable—not unwilling—to pay the $30,000.00 fine when it was originally imposed, he must now spend two more years in prison. While these two years are clothed as the imposition of sentence on revocation of probation on counts as to which the original imposition of sentence was suspended, in fact they are a sentence imposed for the failure of a man to pay a fine that his circumstances in life did not permit him to pay.

The facts and arguments outlined in appellant's brief establish that there is no substantial evidence to support the findings of the Court on which the revocation of probation is based, and further indicate that such revocation was an abuse of the Court's discretion. Appellant therefore prays that this Court set aside the order of the Court below revoking and terminating appellant's probation and vacate and set aside the sentence imposed.

Respectfully submitted,

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Attorney for Appellant.